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In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN M. RANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment and order of the court of appeals (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to December 30, 1979 (Pet. App. B), and the petition was filed on December 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting cross-examination.

2. Whether the district court erred in not questioning the jury about newspaper articles published during petitioner's trial.

3. Whether the record indicates that petitioner's sentence was enhanced because he stood trial.

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on 27 counts of mail fraud, in violation of 18 U.S.C. 1341, 10 counts of wire fraud, in violation of 18 U.S.C. 1343, two counts of bankruptcy fraud, in violation of 18 U.S.C. 152, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on the mail fraud, bankruptcy fraud and conspiracy counts, and concurrent terms of five years' imprisonment on the wire fraud counts to be served consecutively to the sentence imposed for mail fraud. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, while employed by Agra Steel Company, hired Gerald Van Diver for a sales job (Tr. 298).[1] Shortly thereafter, petitioner invited Agra employees, including Van Diver, to join him in a new venture selling and constructing steel buildings. Van Diver accepted (Tr. 303-304).

Before leaving Agra, petitioner entered into a contract on behalf of the new company, Illinois Construction Company-Farm Belt Steel (ICC-Farm Belt), to erect a steel building even though he had neither capital, equipment, nor an erection crew (Tr. 304-311, 1087-1089). The contract required a down payment of one-

[1]Van Diver, who was indicted as a co-defendant, pleaded guilty to conspiracy and mail fraud and testified as a government witness.

third of the total contract price, another one-third when building materials were delivered, and the final one-third upon completion of the building (Tr. 319). Subsequent sales contracts included similar provisions (Tr. 234-235). Customers were told that ICC-Farm Belt had been in business for 25 years in other locations, that its buildings were pre-engineered and mass produced (Tr. 1417-1418), and that the buildings were easy to erect and could be completed in three to four days (Tr. 370-371). ICC-Farm Belt buildings were sold at prices considerably below those of competitors, and in fact below prices customarily paid by dealers (Tr. 19, 1028, 1042, 1375).

Approximately 10 days after the initial down payment was received on a contract, ICC-Farm Belt sent a thank-you letter informing the customer that the company would be calling in seven to ten days to confirm a delivery date for the building. The letter included an offer to sell customers a new product—solar energy heating panels—even though the company had no such product to sell. After receiving the thank-you letter, some customers never heard again from the company (Tr. 21-22, 56-57, 761). Other customers received partial delivery of materials, but not within the time period promised (Tr. 23, 226, 1223-1224, 1430-1431).

ICC-Farm Belt contracted to build 120 buildings from March through August 1977 and collected more than $300,000 in down payments (Tr. 1493-1501). However, the company completely erected only one building and partially erected two others (Tr. 470, 787).

On September 7, 1977, the company filed a bankruptcy petition. One week prior to filing, petitioner opened a new company bank account with a $2,000 down payment check and wrote two checks on that account, one for

$683 payable to John Bingaman and one for $1,251 payable to Bernie Smith. Bingaman and Smith cashed the checks and returned the proceeds to petitioner. At that time, the regular ICC-Farm Belt checking account was overdrawn by $1,207 (Tr. 1277, 1393-1394, 1434-1440, 1507-1509, 1537).

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the district court erred in limiting cross-examination of government witnesses Van Diver and Richard Hollis concerning their subsequent business ventures. He maintains that this evidence was crucial to his defense because it would have shown similar wrongful acts from which the jury could have determined Van Diver's or Hollis' culpability in the instant case. This claim was properly rejected by the court below.

At trial, defense counsel argued that the government should not be permitted to bring out the fact that Van Diver had pleaded guilty to any of the charges in the indictment. The government agreed not to elicit such testimony if defense counsel also agreed not to elicit it. Defense counsel responded that the whole purpose of his motion was to make certain that the guilty plea was not mentioned (Tr. 190).

Since petitioner decided as a matter of trial strategy to exclude the most probative evidence of Van Diver's culpability in the present scheme, namely his guilty plea, petitioner has no cause to complain of the restrictions on cross-examination. Nor would proof of the witnesses' subsequent business transactions, assuming they constituted "bad acts," have been probative of petitioner's innocence in the present scheme. See *United States* v. *Estell*, 539 F. 2d 697 (10th Cir.), cert. denied, 429 U.S. 982 (1976); *United States* v. *Dalton*, 465 F. 2d 32 (5th Cir.), cert. denied, 409 U.S. 1062 (1972). As the court of appeals correctly noted (Pet. App. A3):

> The trial court's restriction of cross-examination of Van Diver and Hollis on their subsequent operation of similar businesses was within the court's discretion to prevent questioning that infringes the witnesses' rights against self-incrimination, *see United States* v. *Varelli*, 407 F. 2d 735, 751 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1971), and to prevent the trial from becoming a collateral prosecution of the witnesses instead of the defendant. See *United States* v. *Estell*, 539 F. 2d 697 (10th Cir. 1976), *cert. denied*, 429 U.S. 982.

Thus the district court's ruling properly narrowed the scope of cross-examination on tangential matters without abridging petitioner's right to confront the witnesses against him and to present a defense.

2. Petitioner further contends (Pet. 17-21) that the district court erred in refusing to inquire of the jurors whether they had been exposed to publicity concerning the trial. This claim rests on a faulty reading of the record and, in any event, is frivolous.

Early in the trial, defense counsel moved for a mistrial based on trial publicity and requested in addition that the court, in counsel's presence, question the jurors individually about what they had seen or heard (Tr. 377-380). In response, the trial judge addressed the following inquiry to the jury as a whole: "[H]ave any of you * * * read or heard about the case on TV, radio, newspapers or anything like that? If anybody has, I should talk to you about what you may have seen" (Tr. 381). One juror stated that he had seen a television story

following the first day of trial, but that it had not reported on the testimony (*ibid.*). The judge then admonished the jury not to read or listen to any publicity about the case (Tr. 382). He repeated the admonition on each of the succeeding eight days of trial (Tr. 707, 859, 1081, 1272, 1480, 1646, 1663, 1672).

Thus, the court did in fact inquire whether the jury had been exposed to prejudicial publicity and concluded that it had not (Tr. 383-384).[2] Therefore, petitioner's quarrel is limited to the court's refusal to interrogate the jurors individually and to the court's denial of his mistrial motion. Under the circumstances, the court can hardly be said to have thereby abused its discretion. See *Holt* v. *United States*, 218 U.S. 245, 251 (1910); cf. *Marshall* v. *United States*, 360 U.S. 310 (1959).

3. Finally, petitioner argues (Pet. 21-26) that his total sentence of ten years was an unduly harsh sentence compared to that imposed on Van Diver, who pleaded guilty and received a sentence of one year and two days' imprisonment to be followed by five years' probation.[3] Petitioner concludes that he was penalized for standing trial. The evidence, however, indicates that petitioner was far more culpable than Van Diver. The venture was petitioner's idea; furthermore, petitioner was president of the company and personally carried out many of the company's fradulent practices. At sentencing, the judge's remarks focused on the impact of the fraud and did not

[2]That conclusion would have been valid even if the jury had paid attention to the publicity. The articles that appeared in local newspapers (Pet. App. C3-C5) simply reflected accurately what had transpired in the court and contained no prejudicial, inflammatory, or inadmissible information.

[3]The terms of Van Diver's sentence were fixed under a plea agreement approved by the court.

suggest even remotely that petitioner was being penalized for exercising his right to a trial (March 21, 1979 Tr. 22-24). In these circumstances, the district court did not abuse its discretion in imposing a sentence within the limits set by statute. See *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Santiago*, 582 F. 2d 1128 (7th Cir. 1978); *United States* v. *Cardi*, 519 F. 2d 309 (7th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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